

IN THE SUPREME COURT OF FLORIDA

INQUIRY CONCERNING A JUDGE
NO. 02-466

Case No. SC03-1846

JUDGE JOHN RENKE, III

MOTION FOR REHEARING

COMES NOW, Judge John Renke, III, by and through his undersigned counsel, and files this Motion for Rehearing pursuant to Florida Rule of Appellate Procedure 9.330, directed to this Court's Opinion, dated May 25, 2006, requesting the Court to consider constitutional and case law authority and mitigating findings it appeared to overlook or misapprehend which warrant a sanction other than removal. Judge Renke further requests the Court to remove the finding of fraud since this charge was not considered or formed by the Judicial Qualifications Commission and the *sua sponte* finding deprives Judge Renke of his procedural due process rights. In addition, Judge Renke requests the Court to clarify whether it considered First Amendment protections in evaluating Judge Renke's judicial campaign speech. In support, Judge Renke sets forth the following argument.

- I. The Court's valid interests in imposing judicial discipline and in deterring future misconduct should be constrained by the Court's standard of review of whether the Hearing Panel's recommended**

sanction is “consistent with governing precedent,” including the Florida Constitution and similar cases.

The standard of review in considering the Hearing Panel’s recommended sanction is whether or not the sanction is “consistent with governing precedent.” In re Pando, 903 So. 2d 902, 904 (Fla. 2005). The Court’s opinion appears to misapprehend the standard of review in rejecting the recommended sanction and ordering removal.

A. The standard set forth in Article V, Section 12, of the Constitution of the State of Florida is not consistent with Judge Renke’s removal.

Although the Court has the power to increase the Hearing Panel’s recommended sanction of a public reprimand, removal is inconsistent with the Florida Constitution since the Hearing Panel determined that the undisputed evidence established Judge Renke’s present fitness to serve as a judge. The Judicial Qualifications Commission’s Hearing Panel, sitting as a neutral adjudicative body, “strongly [held] that he is not presently unfit to serve as a judge” and thus, “unanimously rejected removal.” (Findings at 31, 32). Further, the Judicial Qualifications Commission’s Special Counsel, an arm of the prosecutorial Investigative Panel, argued in its brief to this Court that removal was not warranted. (A.B. at 48). No evidence was presented suggesting that Judge Renke was not a presently fit judge. The Court’s rejection of the Panel’s finding

overlooks significant rehabilitative and mitigating factors which demonstrate Judge Renke's present fitness since Judge Renke's judicial campaign in 2002.

Article V, Section 12, of the Florida Constitution is the primary "governing precedent" addressing judicial discipline. In 1996, Article V, Section 12, was substantially revised by the Committee Substitute for Senate Joint Resolution 978 and ultimately approved by the public in the November 1996 general election. The revisions created a bifurcated Judicial Qualifications Commission proceeding and granted the Court additional authority, including the imposition of harsher penalties. Despite substantial revisions to Article V, Section 12, the standard for removing a judge was not altered. Instead, Article V, Section 12(a)(1), and Article V, Section 12(c)(1), still impose the burden of establishing "present unfitness to hold office" as the sole basis for removal.

The language of Article V requiring demonstration of "present unfitness to hold office" prior to removal is not ambiguous and does not require construction by this Court. Blacks Law Dictionary defines "present" as "now existing; at hand; relating to the present time; considered with reference to the present time." Blacks Law Dictionary 1183 (6th ed. 1990). The clear and definite meaning of "present fitness" requires a showing that Judge Renke is unfit at the "present time" and not when he campaigned three and one-half years ago. This Court has previously held that to modify or extend an "unambiguous statute" beyond its "reasonable and

obvious implications” would be an “abrogation of legislative power.” Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984). Similarly, extending the definition of “present unfitness” beyond its plain meaning of “fitness at the present time” in order to encompass acts occurring three and one-half years in the past, without regard for intervening rehabilitating factors such as remorse and judicial abilities, inappropriately modifies Article V, Sections 12(a) and 12(c), without legislative action or approval by the voters in a general election.

The constitutional burden of establishing “present unfitness” prior to removal appears to cause frustration over the appropriate sanction for judicial campaign misconduct when the judge subsequently proves his/her fitness and ability as a judicial officer. However, this dilemma is caused by the language of Article V, Section 12, which clearly prohibits removal when the judge is presently fit. The inclusion of the word “present” incorporates the possibility of rehabilitation and mitigation since the time of the charged misconduct, instructing the Judicial Qualifications Commission and the Court to consider the totality of the circumstances in formulating the proper recommended sanction.

The Hearing Panel repeatedly referenced this constitutional standard in its Findings by stating, “[t]he Panel believes that Judge Renke has been a very good judge for three years and the Panel thus strongly holds that he is not presently unfit to serve as a judge.” (Findings at 32, citing In re Kinsey, 842 So. 2d 77, 92 (Fla.

2003)). If the Court determines that there is some conduct which cannot be mitigated or rehabilitated, the appropriate solution is to seek formal revision of Article V, Section 12, perhaps by deleting the term “present,” rather than rejecting a recommended sanction after the Hearing Panel followed the current constitutional standard.

B. Existing case law addressing judicial campaign misconduct is not consistent with Judge Renke’s removal.

The standard of review in evaluating the Hearing Panel’s recommended sanction is whether the recommendation is consistent with governing precedent. In re Pando at 904. The Court misapprehended the governing precedent of other similar cases in ordering removal. The only case removing a judge for judicial campaign misconduct also involved misconduct while the judge was on the bench. In re McMillan, 797 So. 2d 560 (Fla. 2001). The Court’s comparison between the present case and In re McMillan is limited to the similarity of the procedural history, noting that in both cases the initial campaign misrepresentation charges were amended after the Court rejected a stipulated resolution. In re Renke at 23. However, the similar procedural histories do not warrant similar sanctions.

In re McMillan is materially distinguishable from Judge Renke’s case since Judge McMillan’s charges were amended to include allegations of serious misconduct after he took the bench. In re McMillan at 564-65. This Court held, “[m]ore importantly, the conduct of Judge McMillan after he became a judge also

places this case in a different category” than that of Judge Alley whose charges solely concerned campaign misconduct. Id. at 572 (distinguishing In re Alley 699 So. 2d 1369 (Fla. 1997)). Ultimately, this Court approved the Hearing Panel’s recommendation for removal reasoning that the “combined effect of the proven misconduct, culminating in a blatant breach of the fundamental principles of judicial ethics while sitting as a judge, demonstrates Judge McMillan’s lack of fitness for office.” Id. at 573.

In contrast, Judge Renke’s Amended Formal Charges added an allegation regarding campaign financing. Judge Renke was never charged with misconduct on the bench. To the contrary, the Panel found that the “undisputed evidence was that Judge Renke has done an excellent job” in a division with double the case load and that he “has shown himself to be a very good judge.” (Findings at 31).

The Court finds that Judge Renke was warned that campaign misconduct would result in removal by emphasizing the Court’s language in In re Alley, 699 So. 2d 1369 (Fla. 1997). In the Renke opinion, the Court notes that it was constrained to accept the recommended sanction in In re Alley due to the language of Article V. In re Renke at 22. However, the Court overlooks the public reprimand subsequently imposed in In re Kinsey, 842 So. 2d 77 (Fla. 2003), for eight separate instances of campaign speech violations. In re Kinsey was decided (a) seven years after In re Alley; (b) five years after Article V was amended to

permit the Court to increase the recommended sanction; and (c) several months after the Renke 2002 judicial campaign. Specifically, In re Kinsey imposed a public reprimand and a substantial fine to “warn any future judicial candidates that this Court will not tolerate improper campaign statements” implying the candidate will not be neutral. In re Kinsey at 92. Judge Renke did not have the benefit of In re Kinsey, decided in 2003, prior to his 2002 judicial campaign.

In addition to In re Kinsey, the Court imposed public reprimands and a public reprimand with a suspension in several other campaign financing cases decided after In re Alley and after the Renke 2002 judicial campaign. See In re Pando, 903 So. 2d 902 (Fla. 2005); In re Gooding, 905 So. 2d 121 (Fla. 2005); and In re Rodriguez, 829 So. 2d 857 (Fla. 2002). Since “governing precedent” is consistent with the Hearing Panel’s recommended sanction, the Court misapprehended the standard of review in rejecting the recommendation and ordering removal.

II. The Court overlooked the role of the Hearing Panel as a neutral adjudicative body in rejecting, without discussion, important mitigating factors and in adding a new charge and finding of fraud.

The Court repeatedly emphasized its rejection of the prior stipulated resolution and based its order of removal, at least in part, on the “history of this

case.”¹ In re Renke at 21. The Court’s reference to its rejection of the stipulated sanction before the formal hearing, at which all the evidence was considered, indicates that the Court may have overlooked the Hearing Panel’s constitutional duty to sit as a “neutral adjudicative body.” Florida Constitution, Article V, Sections 12(b), 12(f)(d), 12(f)(e). See also Commentary on 1996 Committee Substitute for Senate Joint Resolution 978 (explaining that the bifurcated Judicial Qualifications Commission, consisting of separate Investigative and Hearing Panels, was necessary to ensure that charges were heard by a “neutral adjudicative body” independent of the entity that investigated and initiated the complaint). As a result, the Court overlooked or did not appropriately consider relevant mitigating findings.

In order for the Hearing Panel to meet its constitutional obligation, it could not be influenced by the prosecutorial arm of the Judicial Qualifications Commission or the Court’s rejection of the stipulation. Rather, the Hearing Panel was constitutionally empowered to independently determine the Judge’s present fitness or lack of fitness by evaluating all of the evidence, including rehabilitative and mitigating evidence not considered by the Court prior to its rejection of the

¹ The Order rejecting the stipulation did not state the reason for the Court’s rejection; rather, the Court first informed counsel that it believed the stipulated sanction too lenient during oral argument after the final hearing.

stipulation. The Hearing Panel's Findings were reached after hearing the evidence first hand. As this Court has recently reiterated:

In short, we are deprived of the benefit of the Commission's eyes and ears. As a reviewing body, we possess limited insight into such subjective matters as a witness's sincerity, demeanor, or tone, or the comparative credibility of competing witnesses. Without the Commission's insight, we can do little more than take a stab in the dark on such matters.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005) (quoting In re Davey, 645 So. 2d 398, 406 (Fla. 2004)). Moreover, the Hearing Panel represented to the Court that it had considered the appropriate sanction "at length" and after "thorough deliberation." (Findings at 31). In this case, the Hearing Panel was uniquely qualified to evaluate the evidence and reach an understanding regarding all of the circumstances, including the unusual family dynamic which directly impacted Judge Renke's compensation from his small family law firm in general and in the Driftwood litigation in particular. The Court did not address and may have overlooked mitigating factors found by the Hearing Panel which influenced the Panel's recommended sanction.

- A. The Court overlooked the Hearing Panel's finding of the "important mitigating factor" that "Judge Renke had a valid and reasonable expectation of receiving the funds" he used to finance his campaign although he was paid prematurely.

The Hearing Panel determined that it was "an important mitigating factor that Judge Renke had a valid and reasonable expectation of receiving the funds

which eventually turned out to be an illegal campaign contribution” and that Judge Renke “would have been entitled to these same funds after the settlement in the Driftwood litigation was finally approved in the calendar year 2003.” (Findings at 32). This finding is significant because it substantially mitigates this case from other recent cases in which judges received a public reprimand or a public reprimand and short suspension after accepting an improper loan even though those judges had no “valid and reasonable” expectation of legitimately receiving those funds and even though two of those judges misrepresented the source of the funds. In re Pando, 903 So. 2d 902 (Fla. 2005); In re Gooding, 905 So. 2d 121 (Fla. 2005); In re Rodriguez, 829 So. 2d 857 (Fla. 2002). The Hearing Panel’s findings regarding the campaign financing charge, especially when compared with In re Pando and In re Rodriguez, demonstrate that a sanction less than removal is consistent with governing precedent.

The Judicial Qualifications Commission never alleged that Judge Renke misrepresented the source of the funds he used to finance his campaign. Rather, Judge Renke believed he was legitimately entitled to accept the payments in 2002 based on his efforts for the law firm. The terms of the 1998 Driftwood settlement agreement indicate on its face that the Judicial Qualifications Commission finding that the Driftwood attorney fees were “unearned” and unpayable until 2003 was incorrect. The agreement provided:

TOCSA'S Insurer will, within 10 days after this agreement is signed by the attorney, deposit in an interest-bearing account at a place and of a type to be designated by John K. Renke II: (a) \$98,000.00 **for plaintiff's attorney fees incurred through the December 1998 mediation.**

(JQC Exh. 37) (*emphasis added*). The language used unquestionably reflects the status of the Driftwood fees as understood by the attorneys for both sides at that time: the Plaintiffs had "incurred" the fees – i.e., Plaintiffs were liable for paying the earned and owed fees – and the agreement merely transferred the responsibility for payment of the fees from Plaintiffs to Defendants. Thus, as a matter of contract law, the only effect of non-approval of the agreement in 2003 on the Renkes' right to attorney fees would have been to transfer the responsibility for payment and not to negate the Renkes' established right to collect attorneys fees.

Consistent with his belief that his acceptance of these funds was appropriate, Judge Renke disclosed the source of all of his contributions on his Campaign Finance Report and paid taxes on the income. (Findings at 17, 19). While the Court writes that Judge Renke asserted that it was "mere coincidence" that his contributions matched the compensation payments he received, Judge Renke did not assert that these payments were merely coincidental. In re Renke at 13, 19. Instead, Judge Renke explained that he believed the firm could pay him the money that was owed to him as it was needed to fund the campaign. (Findings at 17). Judge Renke's father, as his employer, decided not to pay him in lump sum but rather parsed out the payments when he believed the Driftwood settlement was

imminent. (Findings at 18). While the Court suggests that the Judge's father gave inconsistent reasons as to why he did not just pay his son in one lump sum, one Panel member in questioning John Renke, II, noted that his reluctance to pay the entire amount appeared to be about exerting "control." In re Renke at 19; T. at 635-36.

By finding that the evidence "overwhelmingly indicated that Judge Renke was underpaid," that he had a "reasonable and valid expectation" of receiving the Driftwood fees and that he "would have been entitled to these same funds" in the next year, the Hearing Panel recognized Judge Renke's substantial efforts for the firm. (Findings at 12, 32). The undisputed evidence indicated that Judge Renke was the sole full-time attorney in the Renke Law Firm. The Court finds a correlation between Judge Renke's low pay scale and his limited experience in the courtroom. In re Renke at 13, fn 2. However, the Hearing Panel appropriately determined that Judge Renke performed significant legal work justifying the payment of additional compensation despite the fact that he was not "on his feet" in the courtroom. After seven years of litigation without payment of attorneys' fees, the Driftwood funds were received by the law firm in 2001 and were held separately until the final settlement in 2003. (Findings at 15, 16). The Panel found that Judge Renke, an associate attorney, was required to wait to receive his compensation until the 2003 final settlement. (Findings at 20).

Judge Renke appealed the Panel's determination arguing that there was no authority requiring the Renke Law Firm to wait until 2003 to pay his son. The Court appears to overlook cited authority from the American Bar Association and the opinion offered by the executive director of The Florida Bar's Law Office Management Assistance Service (LOMAS) supporting the 2002 payments to Judge Renke. See James D. Cotterman, ABA Law Practice Management Section, Compensation Plans for Law Firms (4th ed. 2004).

Judge Renke's failure to anticipate the Panel's determination that he was paid prematurely is reasonable since The Florida Bar's own expert on law firm compensation, Mr. J.R. Phelps, executive director of LOMAS, did not fault the compensation payments. Mr. Phelps explained that an employer law firm was not required to wait until the firm could access the final settlement funds before the firm was authorized to pay its associates an agreed percentage of the settlement as compensation so long as the firm used another source of funds to pay the compensation. (T. 877-78). Mr. Phelps' opinion, at the very least, mitigates the seriousness of Judge Renke's mistaken belief in the propriety of the payments.

A firm can agree to pay its associate attorney for legal services despite the firm's risk that the fees could be delayed or never received. There is always a chance the client could claim the attorney fees paid were not earned and the firm would have to pay back those fees. However, the inevitable risk that the firm's

right to the fees could be challenged does not mean the attorney is barred by law from paying its associates for the work performed.

The Court does not reference the Hearing Panel's "important mitigating factor" regarding Judge Renke's entitlement to the fees and instead relies, at least in part, on allegations by the Judicial Qualifications Commission prosecutor that were not adopted by the Hearing Panel. The Court writes, "one of the JQC prosecutors noted that in John Renke's prior three depositions, he had never once mentioned this supposed adjustment in the Driftwood fee-sharing arrangement." In re Renke at 18. However, as referenced in Judge Renke's Reply Brief, the prosecutor was mistaken because John Renke, II, did in fact testify to the complete agreement, including numerous references to the percentage pertaining to the Driftwood fees. (JQC Exh. 52, March 1, 2005 deposition of John K. Renke, II, at 122; Reply Brief at 12; See also JQC Exh. 52, April 23, 2005 deposition of John K. Renke, II, at 7).

Similarly, the Court appears to rely on an argument from the Judicial Qualifications Commission prosecutor, as there was no finding by the Hearing Panel that Judge Renke's mother inconsistently testified to the "purpose of the payment and whether it was to remedy years of underpayment or was due Judge Renke as payment for his specific work on the Driftwood cases." In re Renke at 18. Margaret Renke's testimony is not inconsistent, however, because the Judge's

efforts in the Driftwood case and the years of underpayment went hand-in-hand. The Driftwood case dominated much of Judge Renke's time for the seven years he worked at the Renke Law Firm and he received primarily a minimal hourly wage for his efforts on the case. (Findings at 12, 15). Mrs. Renke testified that the 2002 payments were made pursuant to Judge Renke's agreement with his father in 2000 when the Judge confronted his dad about the low wages. (T. 612-13). Mrs. Renke confirmed that her husband agreed to compensate the Judge for his efforts by giving him roughly half of the Driftwood fees if the Judge agreed not to leave the firm. (T. 613). Mrs. Renke was merely attempting to explain that her husband offered Judge Renke an increased percentage of the Driftwood fees to compensate him for the underpayment when they believed the capital was available. (T. 612-13, 639).

- B. The Court's new charge and finding that Judge Renke committed "fraud" overlooks the role of the Investigative and Hearing Panel as defined by the Florida Constitution, Judicial Qualifications Commission rules and Judge Renke's right to procedural due process as guaranteed by the Florida and Federal constitutions.

The Court relies upon the new charge of fraud to support its rejection of the Hearing Panel's recommended sanction. In re Renke at 25. Article V, Section 12 of the Florida Constitution does not empower the Court to increase or aggravate sanctions for misconduct based on uncharged factual allegations that were not brought pursuant to the Florida Judicial Qualifications Commission Rules. See

Article V, Section 12(a)(creating the Judicial Qualifications Commission and vesting it with “jurisdiction to investigate and recommend to Supreme Court” discipline for judicial misconduct). As noted by the dissenting Justices, an allegation of fraud involves a question of fact. In re Renke at 29 (Wells, J., dissenting) (citing Gibson v. Love, 4 Fla. 217 (1851); Lab. Corp. of Am. v. Prof'l Recovery Network, 813 So. 2d 266 (Fla. 5th DCA 2002)). Thus, the Court was without jurisdiction to charge and find fraud without the participation of the Judicial Qualifications Commission.

The Investigative Panel of the Judicial Qualifications Commission did not consider or find probable cause supporting an allegation of fraud. Fla. Jud. Qual. Comm'n R. 6. The Formal Charges and Amended Formal Charges filed against Judge Renke do not charge fraud. Fla. Jud. Qual. Comm'n R. 6(f), 16. The Hearing Panel of the Judicial Qualifications Commission did not consider evidence concerning allegations of fraud and Judge Renke did not have the opportunity to defend these charges at a hearing. Fla. Jud. Qual. Comm'n R. 15. The Hearing Panel did not certify any findings of fraud to the Florida Supreme Court. Fla. Jud. Qual. Comm'n R. 20. Consequently, the Court's aggravation of the sanction based on a new finding of fraud is without constitutional support.

Charging and then finding a new allegation of fraud for the first time in the Court's opinion after the proceedings are concluded deprives Judge Renke of his

procedural right to due process as guaranteed by the Fourteenth Amendment to the Constitution of the United States of America and Article 1, Section IX of the Constitution of the State of Florida. It is well established that the “fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” Mathews v. Eldridge, 424 U.S. 319, 333 (1975) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)); See also Keys Citizens for Responsible Gov’t, Inc. v. Fla. Keys Aqueduct Auth., 795 So. 2d 940, 948 (Fla. 2001) (holding that “procedural due process requires both fair notice and a real opportunity to be heard”). Since Judge Renke was not provided even the basic procedural safeguards set forth in the Florida Judicial Qualifications Commission Rules, we request the Court to reconsider this finding and any aggravation of the sanction based on the additional finding of fraud.

While the factual basis for the Court’s finding that Judge Renke committed fraud is unclear, Judge Renke will attempt to respond to the Court’s new finding in this limited format of a Motion for Rehearing as set forth below.

1. Judge Renke’s judicial campaign statements did not constitute “fraud.”

Even if the Court finds that Judge Renke is not entitled to procedural due process set forth in the Judicial Qualifications Commission Rules prior to determining that he committed fraud, the charged campaign statements were not fraudulent. This Court has not previously characterized campaign misstatements

as “fraud” even when the responding judge was found to have committed numerous misstatements. See In re Kinsey; In re Alley; In re McMillan. There is no basis for finding Judge Renke’s charged misstatements were any more egregious than the misstatements made by judicial candidates Kinsey, Alley or McMillan. Accordingly, a finding of fraud is not consistent with governing precedent.

The Court’s apparent finding that Judge Renke’s campaign statements amounted to “fraud” is clearly intended to regulate and limit the content of political speech. The United States Supreme Court has determined that any time the State seeks to restrict speech, “the limitations on state authority imposed by the First Amendment are manifestly implicated.” Brown v. Hartlage, 456 U.S. 45, 52 (1982). While the United States Supreme Court requires courts to consider the First Amendment in any analysis restricting speech, this Court does not address or reference the First Amendment or any applicable constitutional standard it used in evaluating the content of Judge Renke’s campaign speech. While Judge Renke and the Judicial Qualifications Commission presented lengthy arguments to the Court regarding First Amendment precedent, it appears the Court did not consider the First Amendment prior to sanctioning Judge Renke for his political statements. Characterizing statements made during a political candidacy as fraud, without discussion or even citation to the relevant First Amendment standard will likely

freeze protected speech. Judicial candidates will be terrified to make any statement under the threat that even the inevitable negligent erroneous statement made in the heat of a campaign will not only be grounds for discipline, but also characterized as fraudulent conduct.

2. The premature payment of compensation, to which the Hearing Panel found that Judge Renke had a “valid and reasonable expectation of receiving,” did not constitute fraud.

The Hearing Panel’s Findings are inconsistent with the Court’s apparent characterization that Judge Renke’s campaign financing amounted to fraud. The Hearing Panel did not find that Judge Renke committed a scheme to disguise a loan from his father in order to finance his campaign. Rather, the Panel found that Judge Renke had worked for the compensation that he received, but accepted his compensation prematurely after finding that the Renke Law Firm could not pay its associate attorney for work on the Driftwood litigation until his firm could access those specific settlement funds. On the other hand, Judge Renke innocently believed that he could use those funds in any manner, including financing his campaign.

The testimony provided by The Florida Bar’s own expert on law firm compensation, Mr. J.R. Phelps, directly refutes any finding of fraud based on Judge Renke’s acceptance of compensation from his law firm. Mr. Phelps is the executive director of The Florida Bar’s LOMAS program and has advised lawyers

on law office practice for the past twenty-three (23) years. (T. 852). Mr. Phelps reviewed Judge Renke's compensation payments and was present through all testimony during the final hearing. Mr. Phelps opined that the Renke Law Firm's decision to pay Judge Renke based on the recovery in the Driftwood litigation before the law firm could access the funds was entirely proper and a common compensation procedure as long as the firm used a separate source of funds to make the compensation payments. (T. 865, 867, 877-78). Even though the Court and Panel ultimately disagreed with Mr. Phelps' opinion, the fact that Judge Renke's belief corresponded with The Florida Bar's analysis demonstrates that Judge Renke did not engage in fraudulent behavior. In addition, this Court did not characterize Judge Pando or Judge Rodriguez's campaign financing violation as "fraud" even though both Judge Pando and Judge Rodriguez had no colorable entitlement to the funds and actively misrepresented the source of the funds. In re Pando; In re Rodriguez.

The Court's new finding of fraud cannot be based upon a violation of Florida campaign financing laws, set forth in Florida Statutes, Chapter 106. First, Florida Statutes, sections 106.08(1)(a) and 106.08(5) do not apply to candidates and cannot be used for any purpose against Judge Renke. Those statutes relate to the person who makes a contribution, and any limit on the amount a candidate may give to his own campaign is unconstitutional. Buckley v. Valeo, 424 U.S. 1, 96

S.Ct. 612 (1976). The Attorney General has opined that the reasoning and holding in Buckley applies in this state and should be followed. See Op. Atty. Gen. Fla. 076-145 (June 28, 1976). Thus, it is clear that under Florida campaign finance law a candidate may contribute unlimited amounts to his campaign. See DE 78-37, Aug. 21, 1978 (Florida Elections Commission Decision).

Under Florida Statutes, section 106.19, a candidate is prohibited from “knowingly and willfully” accepting a contribution in excess of the limits set forth in Florida Statutes, section 106.08. The Florida Elections Commission interpreting Chapter 106 has opined that in order for a contribution to be in violation of the statute, the contributor must be “solely” motivated by the fact that the proceeds will go into a campaign account. See DE 78-37. The opinion of the Division of Elections references the language of Florida Statutes, section 106.011(3)(a), which defines a contribution as a “gift . . . made for the purpose of influencing the results of an election.” Id. (*emphasis added*). If the payment is not solely for the purpose of influencing the election, there can be no violation.

The question here is whether the payment of earned income (declared and reported as such by both the payor and the recipient on federal tax forms in 2002) may constitute a prohibited “contribution” as defined by the statute when one of the clear purposes for the payment was compensation. First, it should be noted that there are absolutely no cases interpreting the aforementioned statutes. The absence

of case law should raise a red flag as to the near impossibility of proving that the sole purpose of a contribution was to influence an election, as opposed to other logical and additional purposes, such as payment for work performed. Second, the very findings by the Judicial Qualifications Commission that this Court attempts to adopt state as follows:

It is also an important mitigating factor that Judge Renke had a valid and reasonable expectation of receiving the funds which eventually turned out to be an illegal campaign contribution. The Panel concludes that Judge Renke would have been entitled to these same funds after the settlement in the Driftwood litigation was finally approved in the calendar year 2003.

(Findings at 32) (*emphasis added*).

The Judicial Qualifications Commission's finding necessarily precludes any conclusion that the payment was a loan or gift from John Renke, II, to Judge Renke. The Judicial Qualifications Commission found that Judge Renke had a "reasonable expectation to receive the payment of income in 2003 for the Driftwood case." One cannot have a "reasonable expectation" of receiving a gift or a loan. The Judge had a reasonable expectation because he had a compensation agreement with his father and because he had worked for more than seven years on the Driftwood case. The Judicial Qualifications Commission's Findings clearly state that Judge Renke would have been "entitled to these same funds after the settlement in the Driftwood litigation was finally approved in the calendar year 2003." This finding expressly admits that Judge Renke not only had a "reasonable

expectation” to these funds, but he was “entitled” to these “same funds.” Again, one cannot be “entitled” to a gift or a loan. The Judicial Qualifications Commission’s finding of entitlement was based on the evidence clearly demonstrating that Judge Renke worked on the Driftwood litigation for almost eight years that he was with the firm. The Driftwood client representative, Robert Lichter, opposing attorneys, the independent attorney, Tom Gurran, as well as the Judge, John and Margaret Renke all testified to the work performed by Judge Renke as the legitimate basis for the income that he was paid in 2002.

Moreover, objective evidence including the law firm’s Form 1099 in 2002 (indicating a deduction of the paid earned income for the Driftwood case by John Renke, II) and Judge Renke’s 2002 federal income tax return, both of which were filed with the IRS long before the amended charge was brought, demonstrate that the two parties to the employment agreement understood that the “purpose” of the payment was to compensate Judge Renke for work performed. If the payment was a “gift” or “loan” in 2002, Judge Renke would not have reported the money he received as earned income on his 2002 tax return. Indeed, under the argument of the JQC, if the payment in 2002 was a gift or loan, and not made for the purpose and with the intent of paying income, then Judge Renke could demand additional payment of the compensation to which he was entitled to in 2003. The objective evidence (1099 form and tax returns) and the testimony of the two parties to the

agreement show that the purpose of payment was to pay earned income for work performed.

Notably, John Renke, II, was given a Form 1099 by the insurance company for approximately \$123,553 in Driftwood fees, which had to be declared as income by him in 2001. Even if John Renke, II, had to repay the money later if the settlement did not go through, he still was required by federal tax law to report the \$123,553 as earned income in 2001. If the payment to John Renke, II, by the insurance company was not a gift or loan, then surely the payment of compensation to Judge Renke in 2002 was also not a gift or loan. John Renke, II, agreed to pay Judge Renke in 2002 based on his “entitlement” to compensation at that time, and because Judge Renke agreed to continue working through 2002, including work on the Driftwood case, after having stated his plan to leave the firm.

The written settlement agreement in the Driftwood case had nothing to do with the oral agreement for compensation. There was nothing in the written settlement agreement which said that John Renke, II, could not pay Tom Gurran or Judge Renke for work performed at any time he agreed to pay them. In fact, both Tom Gurran and Judge Renke were paid an hourly wage for work performed by them in connection with the Driftwood case all along for almost eight years. This payment of their compensation was not conditional on John Renke, II, receiving

any income from the insurance company, nor was Judge Renke's receipt of percentage compensation conditional on John Renke, II, receiving his own fees, as shown by the parties' acts and clear intent. This was not a case where Judge Renke was being paid for no work or with no basis for payment because, as the Judicial Qualifications Commission found, he was entitled to payment of these funds because of the work he performed.

Judge Renke and John Renke, II were free to negotiate the method for computing the amount of Judge Renke's compensation, and the time and manner in which it would be disbursed. The Driftwood case was a factor in determining the amount of Judge Renke's compensation. In finding that the payment to Judge Renke in 2002 was premature, because the final approval in Driftwood did not occur until 2003, the Judicial Qualifications Commission and this Court overlooked Judge Renke's entitlement to the compensation he received in 2002 – notwithstanding that his earned income was related to and computed in part based on the then still pending Driftwood case. Accordingly, there is no fraud or violation of Florida's campaign finance laws under these facts, because the 2002 payment was for legitimately earned income, and not for the sole purpose of influencing an election.

WHEREFORE, and by reason of the foregoing, Judge John Renke, III, request this Court to accept the Hearing Panel's Findings that Judge Renke is

presently fit to hold office and impose a sanction less than removal, consistent with governing precedent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Motion for Rehearing has been filed via e-file@flcourts.org and furnished via FedEx priority overnight delivery to the Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399; and true and correct copies have been furnished by FedEx priority overnight delivery this 8th day of June, 2006 to:

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